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In the Supreme Court of the United States

OCTOBER TERM, 1948.

No. 549 and No. 550.

CARY R. ALBURN, Trustee under the Last Will and Testament of Charles H. Salmons, Deceased, et al.,
Petitioners,
vs.
THE UNION TRUST COMPANY, East 9th Street and Euclid Avenue, Cleveland, Ohio, et al.,
Respondents.
No. 549.

CARY R. ALBURN, Trustee under the Last Will and Testament of Charles H. Salmons, Deceased, et al.,
Petitioners,
vs.
THE NATIONAL CITY BANK OF CLEVELAND, Successor Trustee under the Agreement and Declaration of Trust dated August 15, 1934, etc. et al.,
Respondents.
No. 550.

BRIEF OF RESPONDENT, THE NATIONAL CITY BANK OF CLEVELAND.

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Respondents.

No. 550.

BRIEF OF RESPONDENT, THE NATIONAL CITY BANK OF CLEVELAND.

OPINIONS BELOW.

The Supreme Court of Ohio failed to write an opinion in either the Declaratory Judgment action (Case No. 549) or in the Quiet Title action (Case No. 550). Its orders dismissing the appeals made in both cases on the constitutional question and overruling the motions made to certify the record in both cases appear in the Transcript

of Record in the Declaratory Judgment action (hereinafter referred to as DJR) at pages 9 and 10, and in the Transcript of Record in the Quiet Title action (hereinafter referred to as QTR) at pages 16 and 17. The orders of the Supreme Court of Ohio denying applications for rehearing in both cases appear in DJR at page 9 and in QTR at page 17.

The Court of Appeals of Cuyahoga County, Ohio, delivered a single opinion covering both the Declaratory Judgment and the Quiet Title actions. This opinion was not reported but appears in DJR at pages 86 to 91, both inclusive, and in QTR at pages 76 to 81, both inclusive.

The opinion of the Court of Common Pleas of Cuyahoga County, Ohio, in the Declaratory Judgment action, is reported at 51 O. L. A. 65, 80 N. E. (2d) 721, and further appears in DJR at pages 60 to 82, both inclusive. The Court of Common Pleas rendered no opinion in the Quiet Title action.

JURISDICTION.

The judgment and orders of the Supreme Court of Ohio dismissing the appeals and overruling the motions to certify the record were entered on October 20, 1948. The applications for rehearing in both cases were denied on November 10, 1948. The petitions for writs of certiorari were filed February 7, 1949. The jurisdiction of this Court is invoked under Section 1257(3) of the Judicial Code, as amended by the Act of June 25, 1948.

STATEMENT OF THE CASE.

The basic question raised by the petitions for writs of certiorari is whether it is a violation of due process of law for the courts of the State of Ohio to refuse to make an express adjudication of the validity or invalidity of a land trust created 25 years ago, even though the petitioning land trust certificate holders are the only persons who deny

its validity, even though Petitioners cannot possibly profit by a declaration of invalidity, and even though Petitioners and all other land trust certificate holders may suffer irreparable damage if the trust should be declared invalid. While it is difficult to understand why a question having so obvious an answer is being litigated at all, this Court will readily realize upon an examination of the admitted facts that such is the question before it, and that the present petitions are but the most recent steps along an abortive and meaningless trail of litigated cases which, if followed further, can lead nowhere except to the possible destruction of the very interests which the Petitioners presume to represent.

The trust which Petitioners seek to destroy was created in 1924, at which time there were issued to the public 2,000 shares of equitable ownership in the valuable commercial property known as the Citizens Building which comprises the trust *res*. (QTR 19, 20.) In 1933, after The Union Trust Company had closed its doors and the Superintendent of Banks of the State of Ohio in charge of the liquidation of The Union Trust Company had tendered its resignation as Trustee, The National City Bank of Cleveland was appointed Successor Trustee by the Court of Common Pleas of Cuyahoga County, Ohio. This appointment was made without opposition and with the written approval of the holders of land trust certificates representing 1,731 of the 2,000 shares of equitable ownership. (QTR 20, 21.)

In 1935, some two years after The National City Bank of Cleveland was appointed Successor Trustee, the Supreme Court of Ohio held by its decision in *Ulmer v. Fulton*, 129 O. S. 323, that a certain trust created by another bank located elsewhere in the State of Ohio was void on the ground that it had been created in a manner contrary to the public policy of the State of Ohio. In this decision the Supreme Court further held that since the bank was insolvent, the certificate holders were entitled to claims

as general creditors against the bank and could assert these claims against the Superintendent of Banks in charge of its liquidation.

Inasmuch as there were some elements of similarity between the trust involved in *Ulmer v. Fulton, supra,* and the trust created by The Union Trust Company, the Superintendent of Banks advised The National City Bank of Cleveland by letter dated August 3, 1936, that the case of *Ulmer v. Fulton* raised the question as to whether or not he had an interest in the property held by it as Successor Trustee. The Superintendent of Banks stated, however, that until the question of his interest was determined The National City Bank of Cleveland should continue to administer the trust according to its terms. (DJR 16.)

The Superintendent of Banks has at no subsequent time raised any further question as to the validity of the trust. Nor have any of the land trust certificate holders ever done so except the small and discordant minority who constitute the Petitioners in the present proceedings. Even this minority did not make any attack on the trust until 1942, some seven years after the decision in *Ulmer v. Fulton.* At that time they brought suit in the Court of Common Pleas of Cuyahoga County, Ohio, in what will hereinafter be referred to as the "*Hart* case," * seeking the same relief accorded to the certificate holders in *Ulmer v. Fulton.*

In 1937, some five years before the *Hart* case was instituted, the Ohio Legislature had enacted the so-called McIntyre Act (Section 710-92a, Ohio General Code),** which provided that in the case of an insolvent bank all general claims against it not appearing on its books would be forever barred from participation in any of the assets of the bank unless filed within a time to be fixed by the

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* *Stanley et al. v. Hart,* 29 Ohio Opinions 35 (1942).

** The McIntyre Act is set forth at length in Appendix A to the Petition for Writs of Certiorari.

Superintendent of Banks and published in a local newspaper of general circulation. Since the Superintendent of Banks had published this notice in the case of The Union Trust Company long before 1942 and none of the certificate holders had filed a claim within the time provided, the Court of Common Pleas held in the *Hart* case that the certificate holders were forever barred by the McIntyre Act from participating as general creditors in the assets of The Union Trust Company. In accordance with recognized judicial practice, the Court of Common Pleas therefore refused to decide the other questions raised by the action, such as the question of the validity or invalidity of the trust, since no useful purpose would be served thereby. The *Hart* case was heard *de novo* by the Court of Appeals of Cuyahoga County on the same record and with the same result and was later affirmed without opinion by the Supreme Court of Ohio.*

The dissident certificate holders who had instituted the *Hart* case were by no means satisfied with its outcome. Shortly after the Ohio Supreme Court rendered its decision in that case, they brought an action of mandamus, hereinafter referred to as the "*Cook* case," ** in which they prayed for a writ ordering the Superintendent of Banks to set the trust aside on the ground that it was void for the same reasons stated in *Ulmer v. Fulton*. Once again the Supreme Court of Ohio denied the relief sought, stating that the complaining parties had merely raised the same issues which had already been decided in the *Hart* case and that it did not intend to overrule the result reached therein.† It should be noted that in the *Cook* case the relators asserted that even though it had been decided in the *Hart* case that they were barred by the McIntyre Act from making any claim as general creditors of The Union Trust

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* 142 O. S. 528.

** *State ex rel. Stanley et al. v. Cook et al.*, 146 O. S. 348.

† Ibid, p. 368.

Company, certain equitable remedies would be available to them in the event the trust were declared void. The Supreme Court pointed out, however, that the equitable jurisdiction of the courts had been invoked in the *Hart* case without success and that, in any event, it did not believe that any equitable remedies were available.*

Once again the dissident certificate holders were not satisfied, nor did they apparently believe what the Ohio courts had said in the *Hart* and *Cook* cases. Shortly after the Ohio Supreme Court had rendered its decision in the *Cook* case, they brought a third action in which they sought a declaratory judgment as to the validity or invalidity of the trust. This action is one of the two suits which have been joined in this Court for the purpose of the petitions for writs of certiorari.

Demurrers to the Declaratory Judgment action were filed by all of the principal defendants, namely, The National City Bank of Cleveland, The Union Trust Company, the Superintendent of Banks and Union Properties, Inc. Another group of land trust certificate holders who were seriously disturbed at the repeated attacks on the validity of the trust were also allowed to intervene as defendants for the purpose of filing a demurrer as well. The grounds for the several demurrers are set forth in DJR at pages 26 to 29, both inclusive.

After a protracted hearing and the filing of extensive briefs by all parties, the Court of Common Pleas of Cuyahoga County sustained the demurrers and, when Petitioners as plaintiffs failed to plead further, dismissed the Declaratory Judgment action. The Court of Common Pleas wrote an extensive opinion in which it was concluded that "the matter of the validity or invalidity of the Trust is now an abstract and academic question, and as such is not subject to the action of a court of justice." (DJR 81.) In the course of its opinion, the Court fur-

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* Ibid, pp. 366, 367.

ther observed that "the plaintiffs in their petition do not claim that anyone but themselves are asserting the invalidity of the Trust" (DJR 75) and that they are accordingly "in as favorable a position as they can hope to be under all the circumstances present, and should *let well enough alone.*" (DJR 81.) The Court also pointed out that in so far as the petition raised the possibility of the invalidity of the trust, the plaintiffs were not "in a position to derive any benefit to themselves and the other holders of certificates upon a determination of invalidity." (DJR 81.)

Petitioners appealed from the judgment of the Court of Common Pleas to the Court of Appeals of Cuyahoga County. Extensive briefs were again filed and a full hearing was had. The Court of Appeals nevertheless unanimously affirmed the judgment of the lower court. (DJR 6.) In its opinion, the Court of Appeals, after reviewing the history and the results of the protracted litigation concerning the trust, succinctly summarized its grounds for affirming the lower court, saying that the Court was "not required to pass upon the validity or invalidity of the Trust of August 15, 1924, as no rights can depend upon such adjudication." (DJR 91.)

Petitioners took a further appeal to the Supreme Court of Ohio, and also filed a motion in the Supreme Court for an order directing the Court of Appeals to certify its record. Once again extensive briefs were filed; but the Supreme Court, after according to Petitioners a full hearing, dismissed the appeal and overruled the motion to certify the record. (DJR 9, 10.)

The second of the two suits which have been joined in this Court for the purpose of the petitions for writs of certiorari is a Quiet Title action instituted by The National City Bank of Cleveland as Successor Trustee, naming as parties defendant The Union Trust Company and its successors in interest, the Superintendent of Banks and Union Properties, Inc. It was intended by this action to eliminate

what has from time to time been termed "the tail-end position" of these defendants. This tail-end position arose out of certain rights reserved by The Union Trust Company in the original Agreement and Declaration of Trust dated August 15, 1924, by reason of which it was feared that The Union Trust Company and its successors in interest might have a claim upon a portion of the income from the trust property, even though The National City Bank of Cleveland had been appointed Successor Trustee. Neither the Petitioners nor any other certificate holder were initially made a party to this action, since they were concerned with the issue of the tail-end position only as beneficiaries of the trust and the action was brought by the Successor Trustee for the benefit of all beneficiaries, to assure the purity of the title to the trust property free of the tail-end position.

All of the defendants named by The National City Bank of Cleveland in its Quiet Title petition disclaimed in their answers any interest in the trust property, thereby paving the way for a decree quieting its title. Petitioners, however, were unwilling to accept the benefits which the Successor Trustee was seeking to bestow upon them and all other certificate holders by instituting the Quiet Title action. They insisted upon intervening in the case and filing an answer and cross-petition. In their answer, however, Petitioners did not make any direct claim to an interest in the trust property. They merely denied that The National City Bank of Cleveland as Successor Trustee had good title to the property and asserted that The Union Trust Company and its successors in interest, the Superintendent of Banks of the State of Ohio and Union Properties, Inc. "do have a claim in and to the property described in the petition which they should assert." (QTR 26.) In so far as the cross-petition was concerned, it merely set forth the same allegations previously made in the petition in the Declaratory Judgment action,

and prayed that the trust be found void, that the title and ownership of the property in question be found to be in the Superintendent of Banks as liquidator of The Union Trust Company, and that Petitioners be granted "such other and further relief to which they are entitled and which justice and equity demand." (QTR 33.)

The National City Bank of Cleveland, along with Union Properties, Inc., and the same group of additional certificate holders who had intervened in the Declaratory Judgment action, filed demurrers to the cross-petition. These demurrers were on the same grounds as were the demurrers to the petition in the Declaratory Judgment action.* The Union Trust Company and the Superintendent of Banks filed an answer to the cross-petition in which, after generally denying the allegations of the cross-petition, the answering defendants reviewed the previous litigation involving the validity of the trust and stated that they took no position with respect to that question except to point out that if the trust should be held invalid, the certificate holders would be completely deprived of their property.**

The National City Bank of Cleveland also filed a motion to strike the answer filed by Petitioners as intervening defendants in the Quiet Title action. Union Properties, Inc., moved to strike a portion of the answer as well. The grounds asserted in support of these motions appear in QTR at pages 42 to 46, both inclusive.

The Quiet Title action was joined with the Declaratory Judgment action for purposes of hearing upon the demurrers and motions. As in the Declaratory Judgment action, Petitioners were accorded a full hearing and the opportunity to file extensive briefs in support of their contentions. It was obvious, however, that they were merely seeking to raise once again the very same questions which had already been decided in the *Hart* and *Cook*

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* See QTR 44-47 and 50.

** QTR 38-41.

cases and which had also been raised in the Declaratory Judgment action. For presumably the same reasons which dictated the court's decision to sustain the demurrers to the Declaratory Judgment petition, the court accordingly sustained the demurrers to the cross-petition and struck Petitioners' answer. And since Petitioners did not elect to plead further either by way of answer or cross-petition, although they were given full opportunity so to do, the court thereupon dismissed the cross-petition and rendered the same judgment against Petitioners in the Quiet Title action as was rendered against all of the other defendants. (QTR 6-11.)

The Court of Appeals of Cuyahoga County and the Supreme Court of Ohio both accorded to Petitioners in the Quiet Title action the same full hearing and opportunity to file briefs as were accorded to them by these Courts in the Declaratory Judgment action, the two cases again being joined on appeal. However, both of the appellate courts reached the same decision as they had reached in the Declaratory Judgment action. (QTR 12, 13, 16, 17.)

ARGUMENT.

A. The Decree of Quiet Title was rendered after full hearing and consideration of the contentions of the Petitioners, was not violative of due process of law, but rather was in accordance with established principles of procedure and justice under the law.

The first argument made in support of the Petitions for Writs of Certiorari is that "it was a denial of due process for the state courts, in the Quiet Title action, to have stricken Petitioners' Answer, issued a Decree of Default against them and enjoined them from asserting their rights."

The Quiet Title action was instituted by The National City Bank of Cleveland, Successor Trustee, making as Parties Defendant to the action, The Union Trust Company, Union Properties, Inc. and the Superintendent of Banks. It was intended by this action to eliminate a possible right or claim of right of The Union Trust Company to share in the income of the trust property, the right or claim of right arising out of a provision of the trust indenture. Petitioners were not made parties to the action; the action was brought by the Trustee of their trust for the benefit of all beneficiaries to assure the purity of the title to the trust property free of any right or claim of right of others.

Petitioners, however, demanded the right to intervene and to raise the additional issue of the validity of the trust. The court granted them leave to intervene, become Parties Defendant, and file an Answer and a Cross-Petition. Petitioners say they have not been accorded due process of law in the pursuit of their rights, i.e., with respect to an issue which they attempted to create and inject.

The National City Bank of Cleveland, Successor Trustee, Union Properties, Inc., and another group of certificate holders who were also allowed to intervene and who were seriously disturbed at the attacks upon the trust by the Petitioners, all filed Demurrers to the Cross-Petition

of the Petitioners; and the National City Bank of Cleveland, the Successor Trustee, filed a Motion to Strike the Answer of these new Defendants. Briefs were filed by all parties, including the Petitioners as intervening Defendants. The matter came on for hearing on the Demurrer and the Motion to Strike and a full and protracted hearing was held in which Petitioners as intervening Defendants presented their briefs and arguments in support of the sufficiency of their Answer and their Cross-Petition. A number of substantial reasons were advanced by The National City Bank of Cleveland, Successor Trustee, and by the other parties to the action showing that the Cross-Petition of the Intervenors did not state a cause of action and that the claims of Petitioners should be denied. The court sustained the Demurrers.

There remained the Answer of Petitioners. By its express terms it denied the title of the Successor Trustee, asserted no right or claim of right in Petitioners in respect to the property which was the subject of the Quiet Title action, alleged that the trust in which the property was held was void and that, as a consequence, the property had never become a part of the trust estate. Petitioners thus convincingly proved by their own assertions in their Answer that they were neither necessary nor proper parties to the action which involved the sole question of eliminating any possible rights of The Union Trust Company.*

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* Under Ohio law an action to quiet title is brought under a special provision of the General Code of Ohio, Section 11901:

"An action may be brought by a person in possession of real property, by himself or tenant, against any person who claims an estate or interest therein, adverse to him, for the purpose of determining such adverse or estate interest; or such action may be brought by a person out of possession, having, or claiming to have, an estate or interest in remainder or reversion in real property, against any person who claims to have an estate or interest therein, adverse to him, for the purpose of determining the interests of the parties therein."

(*Continued on following page*)

Even if Petitioners were found to be proper parties in the Quiet Title action, a fact which really ought not even to be assumed for purposes of argument, their general denial of the allegations of the Petition states no cause of action giving rise to a remedy. The courts of Ohio at the time when the Answer was filed had already decided in two previous cases involving the same trust that if the trust were declared void and the title to the property vested in the Superintendent of Banks as Liquidator of The Union Trust Company, no rights or interests of any nature whatsoever would accrue to the land trust certificate holders. In the *Hoyt* case it was held by the Court of Common Pleas, as indicated by syllabus No. 5 of the opinion in 29 Ohio Opinions 35, that:

"The failure of such land trust certificate holders to comply with the provisions of the McIntyre Act, pre-

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(*Continued from preceding page*)

Another section of the General Code of Ohio, 11255, prescribes those who may become parties to an action:

"Joinder of Defendants.—Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff or who is a necessary party to a complete determination and settlement of a question involved therein."

The right of persons to intervene in a lawsuit is discussed in 30 *O. Jur.* "Parties" Section 65, page 793:

"• • • Anyone who is a necessary or proper party defendant within the meaning of General Code, Section 11255, may properly intervene in an action in which he was not originally made a party, although it must be conceded that an intervenor must have an interest in the subject matter which (he) seeks to protect, that one cannot come into an action merely for the purpose of contesting the plaintiff's claim, nor can an entire stranger to a suit on his own motion, be made a party thereto in order to inject new issues into the controversy."

The Courts of Ohio in construing the Quiet Title statute have confirmed the rule that the proper and necessary parties to a Quiet Title action are only those who assert a present right or interest in the property which is the subject of the action: *Collins v. Collins, et al.*, 19 O. S. 468 (1869); *Sidney Telegraph Co. v. Farmers Telegraph Co.*, 11 O. N. P. n. s. 424.

cludes them from asserting claims as general creditors against the Bank."

This result was reiterated by the Supreme Court of Ohio in the *Cook* case, where it was stated by Judge Turner, writing the majority opinion, at page 366, that:

> "The effect of the *Hart* case was to deprive the relators permanently of any standing either legal or equitable, as creditors of The Union Trust Company on account of their holdings of said trust certificates."

Again at page 368 of the same opinion, Judge Turner says:

> "We can see no public interest in having this trust set aside when there has been finally and irrevocably determined in the *Hart* case that the *cestuis que trust-ent* have no standing as creditors of The Union Trust Company. Assuming the trust to be set aside, what would become of the trust assets if they were recovered on behalf of The Union Trust Company. There would indeed be a case creating an unjust enrichment, for the relators are barred from any claim against The Union Trust Company."

After a full and complete hearing in which Petitioners actively participated, the Court of Common Pleas accordingly found that Petitioners had no interest whatsoever in the property which was subject of the Quiet Title action except as beneficiaries of the trust. The Court therefore found Petitioners' Answer to be insufficient, struck the Answer from the record and, when Petitioners failed to plead further, rendered judgment against them.

It was after all of this consideration and judicial process that the Court proceeded to quiet the title to the property, *in which property the Intervenors had not claimed any direct interest whatsoever.*

Petitioners, in spite of all this, say that it was a denial of due process for the court to have stricken the Answer and to have rendered the Decree, that they did not have an opportunity to be heard, and that they did not have their day in court.

Petitioners' reference to *Restatement of Law of Judgments*, Section 6(f), does not support Petitioners' fantastic statement that striking an Answer from the files and rendering judgment by default is necessarily a denial of due process. Such is the case only if, as the *Restatement* points out, the defendant "was denied all opportunity to be heard."

The cases cited by Petitioners likewise fail to substantiate their claims. In *McVeigh v. U. S.*, 78 U. S. (Wall.) 259, a violation of due process of law was found to exist because of *a denial of an adequate hearing*. *Windsor v. McVeigh*, 93 U. S. 274, involved a violation of the constitutional right of due process of law, because the defendant's answer was arbitrarily stricken from the files on the ground he was a rebel and he was *denied any right to be heard*. In *Hovey v. Elliott*, 167 U. S. 409, the defendant's Answer was stricken and a default judgment rendered against him *without giving him any opportunity to present his case*. It is difficult to understand the applicability of these cases to one where the court allowed intervention, permitted the filing of pleadings, accorded due hearing upon the sufficiency of the same and finding them insufficient, struck them from the files.

Petitioners would have it appear that the court sustained the Demurrer and struck the Answer in a discriminatory manner because the court permitted another group of beneficiaries of the trust, who took a position contrary to Petitioners, to remain as Parties Defendant to the action. But these other Intervenors had merely filed a Demurrer to the Cross-Petition of the Petitioners. They took no position antagonistic to the gravamen of the action which was that the title to the real property held by the Trustee should be quieted against The Union Trust Company and its successors in interest. No Answer or other pleading was at any time interposed by these other intervening Defendants. They were heard only in respect to the Demurrer

which they filed against these Petitioners, who were attempting to inject the question of the Trustee's title to the property while at the same time failing to claim any direct interest therein.

All persons who had or claimed any right whatsoever in the property which was the subject of the Quiet Title action were thus before the court, were given every opportunity to file such pleadings as they saw fit, and were accorded a full hearing on the sufficiency thereof. Under the circumstances, there can be no valid complaint that the decision of the Ohio courts denied due process.

B. It is not a violation of due process of law to refuse to do a vain thing, to refuse to be drawn into any further inquiry or adjudication as to the validity of the trust.

Petitioners claim that they have never been accorded a remedy adjudicating the validity of their trust, that their property rights are left insecure and in peril, and that thus they have been denied due process.

The Petitioners, as we have previously stated and as shown by the record, are the owners of 43 out of 2,000 certificates of beneficial interest in the trust estate—a total investment of $43,000.00 out of $2,000,000.00. They are the only ones who express any fear that their property rights are insecure or in peril. The Successor Trustee, joined by a substantial group of certificate holders who have become alarmed by this continued litigation persistently carried on by this discordant minority in all the courts of Ohio, sees only insecurity and peril in these continued attacks by Petitioners. They believe that the only factors of insecurity lie in the undermining of confidence in the certificates, because of the activities of the minority group. There has never been shown any theoretical or practical possibility of advantage to the beneficiaries in these attacks, for a declaration of validity results in the certificate holders retaining that which they now have and always have had

in full measure; whereas a declaration of invalidity leaves them, according to the decisions of the Supreme Court of Ohio, with a claim against the liquidating bank which is definitely barred by the McIntyre Act and other applicable statutes of limitations.

Each certificate holder at the time of the creation of the trust received and holds to this day a land trust certificate which represents an equitable interest in the specific land he originally intended to purchase and which at all times has constituted the entire corpus of the trust estate. That land now is and always has been held for his use and benefit, and represents a very valuable asset belonging wholly to him and to the other certificate holders. An adjudication of the validity of the trust is not necessary in order to clear the title to the property. The Trustee already has a good and sufficient marketable title. There is no insecurity or peril except that which Petitioners are attempting to create.

Petitioners say that "A party's right to sue in a court having jurisdiction of the parties and cause of action, includes the right to prosecute his claim to judgment," citing *Washington-Southern Navigation Co. v. Baltimore & Philadelphia Steamboat Co.*, 263 U. S. 269. To this we entirely subscribe and call attention to the fact that in the Declaratory Judgment action, after full hearing on the Demurrer, Petitioners were found to have stated no cause of action. Upon review by the Court of Appeals, the action of the lower court was sustained. Upon Motion to Certify to the Supreme Court of Ohio, upon the briefs and oral argument, the motion was denied. This certainly represents a full and complete right to prosecute one's claim to judgment, and it certainly comprehends a full granting of due process of law.

It is said that "The state courts must under the Federal due process clause afford a party a remedy and a determination of his rights, citing *Brinkerhoff-Faris v. Hill*, 281

U. S. 673." It surely cannot be asserted that the facts and processes followed in the *Brinkerhoff* case are kindred in any respect to the instant cases where Petitioners were allowed full opportunity to be heard, and where it was found that in prior litigation Petitioners, after full hearing, had failed to state grounds for further consideration of the validity of the trust.

The Supreme Court of Ohio has twice before and also now in these actions found that it is useless and unnecessary to inquire further into the facts of the creation of the trust for the reason, among other things, that all remedies which conceivably might have been available, have been extinguished or previously denied.* So long as the courts can be persuaded to indulge in inquiries as extensive and protracted as have the courts on behalf of Petitioners, it can scarcely be stated that there has been a denial of due process of law.

C. All remedies have been extinguished or previously denied by courts of competent jurisdiction, and there remain no further requirements of due process of law.

Under the heading "Analysis of Ohio Courts' opinions" Petitioners demonstrate again the futility of their efforts to find in the record of these two cases, or in previous litigation in connection with this trust, a violation of due process of law.

Petitioners say that their ultimate objective is to have a claim against The Union Trust Company; that they prefer to have such a claim instead of their trust and their

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* The possible remedies which might arise out of a declaration of invalidity of this trust or any such trust were analyzed in detail in our Brief before the Supreme Court of Ohio. The analysis brings one to the necessary conclusion, also arrived at by the lower court and in the subsequent reviews by the higher courts, that all possible remedies are unavailable. A synopsis of the analysis of remedies may be found in the Appendix at the end of this Brief.

present possession and ownership of the corpus of the trust. Petitioners predicate their opportunity to acquire such a claim on the assumption that the trust will be found to be the same kind of a trust as that involved in the case of *Ulmer v. Fulton*; that it will therefore be adjudged invalid; and that they will thereupon acquire rights as general creditors which may be asserted against The Union Trust Company and its successors in interest, in spite of the McIntyre Act and other applicable statutes of limitations, and in spite of the previous decisions of the Supreme Court of Ohio in the *Hart* and *Cook* cases that the McIntyre Act bars recovery. The Petitioners attempt to surmount these difficulties by saying that their right of claim will exist for the first time only upon a declaration of invalidity of the trust and that, as a consequence, the period of limitation of the McIntyre Act and all other statutes of limitations operate and begin to run only from that time; that the bank, acquiring the property, the corpus of the trust, would be unjustly enriched; and that equity would give relief against the legal bar of the statute of limitations.

The obstacles in the path of Petitioners are momentous. Contrary to this small minority group, the Successor Trustee and all others, including the Ohio courts, believe that the facts of the creation of the trust are not kindred to the facts of the *Ulmer* case upon which Petitioners rely, and recognize that the trust is valid. We believe the sole rights of the beneficiaries of an invalid trust, if found to have been improperly created by the bank, are as general creditors of the bank. The Supreme Court of Ohio has so decided. We believe that the McIntyre Act precludes any recovery on any such claim. The Supreme Court of Ohio has so decided.* We find the law to be quite clear and decisive that statutes of limitation run against all remedies which might be available from a void trust, not from the time of a declaration of invalidity, but from the

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* *Stanley v. Hart*, 142 O. S. 528.

time of creation of the trust.* This trust was created in 1924, more than twenty-one years prior to the filing of these suits. Thus, every conceivable remedy has been barred. Unjust enrichment, a form of equitable relief, is available as a remedy only when there are no adequate remedies at law.

Due process does require that the court give consideration to issues which affect rights and property. There cannot be any failure of the required processes of law where upon due hearing and consideration under the usages at law and in equity, it is found that the requests of Petitioners must be denied because they give rise to no right or remedy.

D. The property rights of the beneficiaries of the trust are fully established.

It is said that a judicial determination of the trust is necessary to prevent impairment and possible loss of the property rights of the beneficiaries of the trust. It is said that "due process requires that the court put an end to the uncertainty of the beneficiaries' property rights by determining whether the trust was valid or invalid." Any uncertainty which might have existed has long since been dissolved. The Supreme Court of Ohio has now four times had before it issues involving the validity of the trust. In each case by refusing to disturb the trust it has recognized and accepted it. It stands, except for the attacks of this small group of certificate holders, as being valid, subsisting and inviolate. The Courts have found any further discussion of the subject of validity or invalidity to be academic and abortive. The certificate holders already have all that can be obtained. The certificate holders cannot now be deprived of their trust or their trust property, nor

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* *Pelton v. Bemis*, 44 O. S. 51; *Grossbeck v. Cincinnati*, 51 O. S. 365; *Fidelity & Deposit Co. v. F. & C. Bank*, 72 O. App. 432; *Leather Manufacturers Bank v. Merchants Bank*, 128 U. S. 26.

can the marketability or the value of the trust property be impaired or diminished, since the title and ownership thereof has been confirmed by the court of last resort in Ohio.

Respectfully submitted,

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APPENDIX.

ANALYSIS OF REMEDIES.

To warrant the making of a determination of the validity or invalidity of the trust in question, there must be alleged facts which show the right to invoke the powers of the court for such an adjudication. Otherwise, the Petition in the Declaratory Judgment action and the Cross-Petition in the Quiet Title action are subject to Demurrer. It will be found that all conceivable remedies have been extinguished or previously denied.

(a) The remedy of a right or claim against the Superintendent of Banks has been irrevocably denied by this Court.

The case of *Ulmer v. Fulton, supra,* which is obviously the basis for Petitioners' contentions, holds that if a trust is found to be invalid, the holders of certificates are deemed general creditors. Syllabus 4 of *Ulmer v. Fulton* reads as follows:

> "Upon the insolvency of a bank and trust company, which has attempted to create trusts out of its own securities and has sold participation certificates therein to the public, the holders of such participation certificates will be placed in the position of general creditors."

It thus appears that if, either in the Declaratory Judgment action or in the Cross-Petition in the Quiet Title action, the Petitioners were able to make allegations and prove facts to show that the original trust was invalid, they would be relegated to the sole remedy of a right or claim against The Union Trust Company or the Superintendent of Banks. But there had been already in two instances a full and final adjudication by the Supreme Court to the effect that if such a claim ever existed, it has been now extinguished, and any recovery on the basis of a personal claim against the Superintendent of Banks forever barred.

This fact is certainly apparent and ought to be beyond question from a reading of the opinions of this Court in the cases of *Stanley, et al. v. Hart, supra*, and *State, ex rel. v. Cook, supra.*

In *State, ex rel. Stanley v. Cook, supra*, Judge Turner says at page 368:

> "We can see no public interest in having this trust set aside when there has been finally and irrevocably determined in the *Hart* case that the *cestuis que trust-ent* have no standing as creditors of The Union Trust Company. Assuming the trust to be set aside, what would become of the trust assets if they were recovered on behalf of The Union Trust Company. There would indeed be a case creating an unjust enrichment, for the relators are barred from any claim against The Union Trust Company."

Again, Judge Turner said at page 370:

> "The effect of granting a writ [of Mandamus] in this case would be to command the Superintendent of Banks in disregard of a statutory instructor (Section 710-95, General Code) to proceed to present an action against The National City Bank to recover the Citizens Building property. Just what statute the Superintendent would follow has not been pointed out. Surely not Section 710-95, General Code, for under that statute it is his duty to follow the instruction of the Common Pleas Court in Case No. 392938, entitled 'In the Matter of the Liquidation of The Union Trust Company.' * * *"

Again, at page 373, Judge Turner says:

> "In the *Hart* case relators here had a plain and adequate remedy in the ordinary course of the law authorized by Section 710-92 and Section 710-95, General Code. They lost there not because the action was not properly brought but because their claims had not been filed within the time limited by the law.
>
> "The Banking Act (Section 710-89, *et seq.*, General Code) provides a plain and adequate procedure for the liquidation of banks and the determination of all

claims arising in the course of such liquidation. See *Commercial Bank & Savings Co. v. Woodville Savings Co.*, 126 O. S. 587, 186 N. E. 444."

Petitioners would, at the most, therefore be in the position of general creditors if the trust were invalid, since they would be conclusively precluded from asserting any such claims as general creditors, their Petition in the Declaratory Judgment Action and Cross-Petition in the Quiet Title case did not state a cause of action.

(b) The McIntyre Act, a part of the Banking Act of Ohio, expressly bars any recovery.

By its express provisions and by all interpretations thereof the McIntyre Act clearly precludes the assertion by Petitioners of claims as general creditors of The Union Trust Company in liquidation.

Stanley, et al. v. Hart, 29 O. O. 35, Syllabus 5, reads as follows:

> "The failure of such land trust certificate holders to comply with the provisions of the McIntyre Act (Section 710-92a, General Code), precludes them from asserting claims as general creditors against the bank."

(c) No remedy is available because the question of validity is res judicata.

In 1933, after the closing of The Union Trust Company, the Court of Common Pleas of Cuyahoga County, pursuant to an application by the Superintendent of Banks, appointed The National City Bank of Cleveland as Successor Trustee. In that connection the court made an order authorizing and directing the Superintendent of Banks:

> "* * * to convey the premises prescribed in said Agreement and Declaration of Trust * * * together with all right, title and interest of The Union Trust Company * * * unto said The National City Bank of Cleveland as Trustee upon the trusts and subject to the terms

and conditions of said Agreement and Declaration of Trust dated August 15, 1924."

The Banking Act, in connection with any such application, prescribes the method, which is an exclusive one, by which an order thus entered in general liquidation proceedings may be attacked. Thus, the last paragraph of General Code 710-95 reads:

> "No order of the Common Pleas Court or judge thereof entered pursuant to this section shall be deemed a final order; but by leave of court an independent suit may be brought not later than five days after such order is entered by any person deeming himself aggrieved thereby, to restrain any action thereby authorized."

None of the certificate holders, nor anyone else, has ever sought to attack the transfer to the Successor Trustee. All stockholders, creditors of the bank and other interested parties were bound to take notice of any act done in the liquidation proceedings. Under the express provisions of the statute, any action by a stockholder, creditor or other interested party to prevent compliance with the order of the court had to be taken within five days after the order was entered. There is nothing in the Petition for Declaratory Judgment or in the Cross-Petition in the Quiet Title action asserting that such action was taken, and no such allegation could be made, since it would have been contrary to fact.

If the prior action of the Common Pleas Court in ordering the transfer of the property is no longer subject to attack or review, then the title of the Successor Trustee is inviolate, and, consequently, the validity or invalidity of the trust is no longer the subject of controversy. The Petitioners, not having any remedy available to them, cannot be said to have stated a cause of action, either in the Declaratory Judgment action or the Quiet Title action. The complaining certificate holders, thus being concluded,

have no right or interest in the property except through the Successor Trustee, which, in any event, would seem to be all they ever intended to acquire.

(d) There is no remedy under recoupment or unjust enrichment.

If by any chance the Court could take jurisdiction to inquire into the validity of the trust and the trust was determined to be invalid, we have previously found that all rights or claims against the Superintendent of Banks are irrevocably concluded. What, if any, rights in such case would the Appellants have in respect to the property which is the subject of the trust?

At the outset it will be recognized that any recovery based upon the theory of recoupment or unjust enrichment would be available only if the Petitioners had not had an adequate and complete remedy at law. Such a remedy was expressly given under the Ohio Banking Act had they seen fit to avail themselves of it by making a timely claim with the Superintendent of Banks. If the Superintendent had denied the claim on the grounds that the trust was not kindred to the type of trusts contemplated under the *Ulmer* and *Haggerty* cases, they could have followed the statutory procedure and filed an independent action to gain a further adjudication of their claimed rights, but they did not do that which the law required of them. Equity will not intervene in cases in which the Legislature has prescribed fair and adequate remedies of law which govern the rights of parties. Equity will not create new substantive rights under the guise of doing equity.